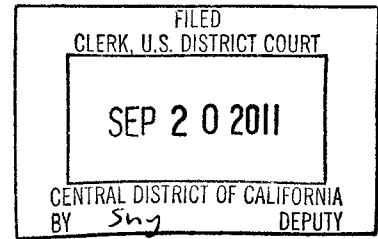


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY  
FIRST CLASS MAIL, POSTAGE PREPAID, TO ~~ALL COUNSEL~~ *petitioner*  
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF  
RECORD IN THIS ACTION ON THIS DATE.

DATED: September 20, 2011

*Clayton J. [Signature]*  
DEPUTY CLERK



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

EUGENE EVERAL BAIRD,

Petitioner,

v.

MATTHEW CATE, SECRETARY OF  
CDCR,

Respondent.

Case No. SACV 11-01401 GAF (AN)

**ORDER TO SHOW CAUSE RE  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY AS  
TIME-BARRED**

**I. BACKGROUND**

Before the Court is a petition for writ of habeas corpus ("Petition") brought by Eugene Everal Baird ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises four claims directed at Petitioner's March 1, 2007 conviction in the California Superior Court for Orange County (case no. 06SF1142) of second degree burglary and grand theft, and sentence enhancements, for which he was sentenced to 7 years in state prison. For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

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## II. DISCUSSION

### A. Standard of Review

Habeas Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

### B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

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1 The face of the Petition and relevant state court records<sup>1/</sup> establish the following  
 2 relevant facts. Petitioner was convicted of the above offenses on March, 1, 2007, and  
 3 sentenced on March 23, 2007. On September 22, 2008, the California Court of Appeal  
 4 affirmed the judgment of conviction (case no. G038403). The California Supreme  
 5 Court then denied review of the court of appeal's decision on December 10, 2008  
 6 (case no. S167969). (Pet. at 2-3<sup>2/</sup>; state court records.) Petitioner does not appear to  
 7 have filed a petition for certiorari with the United States Supreme Court.

8 Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment  
 9 became final on March 10, 2009, the ninetieth day after the state high court denied his  
 10 petition for review and the last date for him to file a petition for certiorari with the  
 11 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of  
 12 limitations then started to run the next day, March 11, 2009, and ended a year later on  
 13 March 10, 2010. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d  
 14 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the day after the  
 15 triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not constructively file  
 16 his pending Petition until September 9, 2011 -- 548 days (eighteen months) after the  
 17 expiration of the limitations period.<sup>3/</sup> Accordingly, absent some basis for tolling or an  
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19 <sup>1/</sup> The Court takes judicial notice of Petitioner's records in the superior court,  
 20 which are available on the Internet at <https://ocapps.occourts.org>, and in the state  
 21 appellate courts, which are available on the Internet at [http://appellatecases.court](http://appellatecases.courtinfo.ca.gov)  
 22 [info.ca.gov](http://appellatecases.courtinfo.ca.gov) ("state court records"). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir.  
 23 2002) (federal courts may take judicial notice of relevant state court records in federal  
 habeas proceedings).

24 <sup>2/</sup> Petitioner did not consecutively number the pages of the Petition and his  
 25 attached pages as required by Local Rule 11-3.3. For sake of clarity, the Court cites  
 26 the pages of the Petition and the attachments by referring to the electronic pagination  
 furnished by the Court's official CM-ECF electronic document filing system.

27 <sup>3/</sup> Pursuant to the "mailbox rule," a *pro se* prisoner's federal habeas petition  
 28 (continued...)

1 alternative start date to the limitations period under 28 U.S.C. § 2244(d)(1), the  
2 pending Petition is time-barred.

### 3 **C. Statutory Tolling**

4 AEDPA includes a statutory tolling provision that suspends the limitations  
5 period for the time during which a “properly-filed” application for post-conviction or  
6 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*  
7 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th  
8 Cir. 2005). An application is “pending” until it has achieved final resolution through  
9 the state’s post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.  
10 2134 (2002). The limitations period is not tolled between the time a final decision is  
11 issued on direct state appeal and the time a state collateral challenge is filed because  
12 there is no case “pending” during that interval. *Thorson v. Palmer*, 479 F.3d 643, 646  
13 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). On collateral  
14 review, however, “intervals between a lower court decision and a filing of a new  
15 petition in a higher court,” when reasonable, fall “within the scope of the statutory  
16 word ‘pending’” thus tolling the limitations period. *Saffold*, 536 U.S. at 221, 223;  
17 *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (*citing Saffold*).

18 Further, to qualify for statutory tolling during the time the petitioner is pursuing  
19 collateral review in the state courts, his first state habeas petition must be  
20 constructively filed before, not after, the expiration of AEDPA’s one-year limitations  
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22 <sup>3/</sup> (...continued)

23 is deemed to be filed on the date the prisoner delivers the petition to prison authorities  
24 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379  
25 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *see also* Habeas Rule  
26 3(d). The envelope containing the pending Petition was postmarked by the prison mail  
27 system on September 9, 2011, and filed with the Court on September 12, 2011. (Pet.  
28 at 1, 53.) For purposes of the timeliness analysis, and absent proof to the contrary, the  
Court assumes Petitioner constructively filed the Petition by delivering it to the prison  
mail system on September 9, 2011.

1 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254  
 2 does not permit the reinitiation of the limitation period that has ended before the state  
 3 petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Webster v.*  
 4 *Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition [] that is filed  
 5 following the expiration of the limitations period cannot toll that period because there  
 6 is no period remaining to be tolled”).

7 The face of the Petition and relevant state court records establish Petitioner filed  
 8 four state habeas petitions. On August 17, 2009, he filed a habeas petition in the state  
 9 superior court (case no. OCSC M12888), which was denied on August 25, 2009. Next,  
 10 on November 4, 2009, he filed a habeas petition in the state court of appeal (case no.  
 11 G042850), which was denied on December 17, 2009. On February 3, 2010, he filed  
 12 another habeas petition in the state court of appeal (case no. G043291), which was  
 13 denied on March 25, 2010. Finally, on February 24, 2010, Petitioner filed a habeas  
 14 petition in the California Supreme Court (case no. S180472), which was denied on  
 15 September 1, 2010. (Pet. at 4-5, 41-44; state court records.) Even assuming Petitioner  
 16 receives the full 380 days of statutory tolling for the pendency of all his state habeas  
 17 petitions,<sup>4/</sup> extending AEDPA’s limitations deadline from March 10, 2010, to March  
 18 25, 2011, the pending Petition would still be untimely by 168 days.

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20 \_\_\_\_\_  
 21 <sup>4/</sup> However, it does not appear Petitioner would be entitled to interval tolling  
 22 between his first and second state habeas petitions. As stated above, intervals between  
 23 a lower court decision and the filing of a new petition in a higher court toll the  
 24 limitations period *where reasonable*. *Saffold*, 536 U.S. at 221, 223; *Evans*, 546 U.S.  
 25 at 192. However, here, the interval between the superior court’s decision and the filing  
 26 of Petitioner’s next habeas petition in the state court of appeal spanned 71 days, from  
 27 August 25 to November 4, 2010. That interval was longer than “the ‘30 to 60 days’  
 28 that ‘most States’ allow for filing petitions, and [Petitioner has] offered no justification  
 for the delay[] as required under California law.” *Chaffer v. Prosper*, 592 F.3d 1046,  
 1048 (9th Cir. 2010) (citations omitted); *see also Banjo v. Ayers*, 614 F.3d 964, 970  
 (9th Cir. 2010).

1 The face of the Petition and relevant state court records establish the pending  
2 Petition is still untimely despite any statutory tolling to which Petitioner is entitled.

3 **D. Alternative Start of the Statute of Limitations**

4 **1. State-Created Impediment**

5 In rare instances, AEDPA's one-year limitations period can run from "the date  
6 on which the impediment to filing an application created by State action in violation  
7 of the Constitution or laws of the United States is removed, if the applicant was  
8 prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Asserting that  
9 the statute of limitations was delayed by a state-created impediment requires  
10 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir.  
11 2002). Thus, a claim under this provision "must satisfy a far higher bar than that for  
12 equitable tolling." *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009). Petitioner's  
13 filings do not set forth any facts that show he is entitled to relief under this provision.

14 **2. Newly Recognized Constitutional Right**

15 AEDPA provides that, if a claim is based upon a constitutional right that is  
16 newly recognized and applied retroactively to habeas cases by the United States  
17 Supreme Court, the one-year limitations period begins to run on the date which the  
18 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).  
19 Petitioner's filings do not set forth any facts that show he is entitled to relief under this  
20 provision.

21 **3. Discovery of Factual Predicate**

22 AEDPA also provides that, in certain cases, its one-year limitations period shall  
23 run from "the date on which the factual predicate of the claim or claims presented  
24 could have been discovered through the exercise of due diligence." 28 U.S.C. §  
25 2244(d)(1)(D); *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). Petitioner's  
26 filings do not set forth any facts that show Petitioner is entitled to an alternate start  
27 date to the limitations period based upon the late discovery of the factual predicate.

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**E. Equitable Tolling**

The AEDPA's limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2560 (2010). However, "[e]quitable tolling is justified in few cases" and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)).

"[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079 (2007). *Pace*'s diligence prong requires the petitioner to show he engaged in reasonably diligent efforts to file his § 2254 petition throughout the time the limitations period was running. *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006); see also *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (equitable tolling requires a showing that "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll" and "extraordinary circumstances prevented him from filing his petition on time"). The petitioner must also demonstrate that he exercised reasonable diligence in attempting to file his habeas petition after the extraordinary circumstances began otherwise the "link of causation between the extraordinary circumstances and the failure to file [is] broken." *Spitsyn*, 345 F.3d at 802. *Pace*'s "extraordinary circumstances" prong requires the petitioner to "additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances made it impossible to file a petition on time." *Ramirez*, 571 F.3d at 997 (internal quotations and citations omitted). Further, equitable tolling determinations are "highly fact-dependent," *Mendoza*, 449 F.3d at 1068, and the petitioner "bears the burden of showing that equitable tolling is appropriate." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

Petitioner's filings do not show he is entitled to equitable tolling in this case.

**ORDER**

Based on the foregoing, the Court finds the Petition is untimely. Accordingly, Petitioner shall have until **October 7, 2011**, to file a written response and show cause why his Petition should not be dismissed with prejudice because it is time-barred.

**Petitioner is warned that if a timely response to this Order is not made, Petitioner will waive his right to respond and the Court will, without further notice, issue an order dismissing the Petition, with prejudice, as time-barred.**

**Further, if Petitioner determines the Court's above analysis is correct and the Petition is clearly time-barred, he should consider filing a Request For Voluntary Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.**

IT IS SO ORDERED.

DATED: September 19, 2011

  
ARTHUR NAKAZATO  
UNITED STATES MAGISTRATE JUDGE